EVOLUTION OF AMENDMENT IN THE CONSTITUTION OF THE UNITED STATES.

WHATEVER may be our estimate of the philosophy of Hegel as a scheme of thought, we may, most of us, agree that his theory of the progress of History is replete with elemental truth. It is briefly this: that institutions are the self-revelation of human nature, and that the tendency of their development is towards the attainment of the rational freedom of the individual man; which rational freedom is not a mere caprice, but is that harmony between the volition of the citizen and the needful requirements of organized society in virtue whereof laws are obeyed with cheerfulness because they proceed from, represent, and satisfy the enlightened desires of those who obey them.

As a result of this purpose and process, government in its best form continually expresses the developed will of the governed. It is no longer something alien and hostile, to be feared and hated by those who are compelled to submit to it, or to be warred upon by those who think themselves able to resist it, but it becomes truly representative in its character. The institutions of a semi-civilized people are full of restrictions which we can hardly understand, and of which we are sometimes too impatient, unless we take the point of view of their immediate origin. They are like the chrysalis which confines and holds captive for a time the life within, and which is yet found to be a useful and normal condition of progress. The institutions of a people who have grown into a state of rational freedom are like well fitting garments, which conform to the figure and are fashioned for convenient use, for easy activity, for decent protection. The progress of rational freedom tends to a liberation from outward control in any arbitrary or merely restrictive method; not because institutions no longer exist, but because they are

felt to be just and desirable, because they proceed from and represent, so far as may be practicable at the moment, the best and most sedate desires of those who are called upon either to enforce or to obey the law. It follows from this that as men grow, advance, and unfold, their institutions must be modified. A government is, in this relation a vital organism. It must manifest an orderly evolution or suffer the penalties of an arrested development. And the test of its healthy growth will be found in the answer to the question how far and how well does it permit and promote the rational freedom of the individual man.

It may not be entirely useless in this era of centennials, to consider the Constitution of the United States and its Amendments in the light of the foregoing theory, and to inqure how far this organic law fulfils what is here assumed to be the true purpose of government.

It may be noted in the first place that the Constitution of the United States, as originally adopted and ratified, contained many provisions in the nature of a bill of individual rights. In the preamble itself it was declared among other things that a principal purpose of the people of the United States in the framing of the instrument was "to secure the blessings of liberty" to themselves and their posterity. It was thus implied that such liberty already existed. It was not to be conferred, but was to be secured. It was not to be impaired by any of the powers which were delegated to any of the departments of the government, but the intendment was that the newly constituted authorities should foster rational freedom so far as possible.

But beyond this abstract statement, which might have been interpreted as a glittering generality, there were specific provisions which looked to the protection of individual freedom from official invasion. It was declared that a judgment in a case of impeachment should not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States, to the end that there might be no such tragedies in this

country as had been witnessed in England in cases of this kind. It was declared that the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require such suspension. It was declared that the trial of all crimes against the new government, except in cases of impeachment, shall be by jury, and held in the State where the crime shall have been committed. The terrors of constructive treason and the horrors of the bill of attainder, whether by national or State legislation, were abolished. The passage of *ex post facto* laws, whereby an act previously done should be decreed to have been a crime, was forbidden alike to the Congress and the States. The States were forbidden to pass any law impairing the obligation of contracts, a provision of wide significance in securing the right of individual agreement, as well as the sanctity of legislative grant. Both the United States and the several States were forbidden to confer any title of nobility, to the end that so far as such a prohibition could be effective there should be no such thing as caste in our country. And finally, it was declared that no religious test shall ever be required as a qualification to any office or public trust under the United States. The origin of such ideas is apparent to any one who considers the difficulties and contests of English history. The importance of such provisions is manifest.

They did not, however, satisfy all the acute and cautious politicians who discussed so strenuously the question of the adoption of the Constitution by the conventions of the States; and it is well known that the Constitution was ratified by a sufficient number of those conventions with an understanding that certain amendments would be adopted as soon as the prescribed forms of law could be complied with. In September, 1789, the first Congress, by joint resolution, proposed twelve amendments, the preamble reciting the general desire which had been expressed for such action. The first two, which concerned the number of representatives and the compensation of members of the Congress were not ratified and

need not be specifically referred to. The remaining ten were ratified by the necessary number of legislatures by December 15, 1791, New Jersey being the first State to act and Virginia the last. It is said that there is no evidence on the Journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ever ratified these amendments at all.[1]

It should be borne in mind that these ten amendments of 1791 are limitations on the powers of the government of the United States, and are not applicable to the legislation of the States or the doings of State authorities.[2] This fact is sometimes forgotten by enthusiastic editors, and even by those who profess and call themselves lawyers. The main purpose of these amendments is to protect the rights of individuals against encroachment by the federal power, to the end that rational freedom may be promoted in the federal relation.

The first in number, as adopted, declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. The second declares that a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. The third enacts that no soldier shall in time of peace be quartered in any house, without the consent of the owner; nor in time of war but in a manner to be prescribed by law. The fourth enacts that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. The fifth article declares that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment

[1] Poore's *Constitutions*, Vol. I., p. 21. [2] Barron *vs.* Baltimore, 7 Peters, 243.

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,[1] nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. The sixth article enacts that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defence. The seventh article concerns civil proceedings in federal courts, and declares that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The eighth article adds the further prohibition that, in federal courts, of course, excessive bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishments inflicted. And finally, the ninth and tenth articles lay down rules familiar to the jurist, that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people; and that the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.

It is easy to trace the origin of these noble provisions, clothed as they are in such simple yet majestic language. They recall the Magna Charta, the Petition of Rights, the

[1] Counselman *vs.* Hitchcock, 142 U. S. Rep., 547.

Bill of Rights of 1688. They embody in the most condensed form the rules which had been slowly evolved by the English people and their descendants, through centuries of travail, of struggle, and of war. They exhibited the high resolve that whatever the new government of 1789 might do, there were these things it should not do; and that the federal power, however necessary and useful it might be, should not stand in the way of that rational freedom which was felt to be the final object of all institutions.

It is not necessary for the purposes of this paper to discuss the eleventh and twelfth articles of amendment to the Constitution of the United States, which relate, respectively, to suits against the several States, and to the revised method of electing the President and the Vice-President; and which were ratified, the former in 1798 and the latter in 1804. Pursuing the idea of evolution and the question of the relation of government to rational freedom, we come to the thirteenth, fourteenth and fifteenth amendments, adopted after the late Civil War. It is at once seen that in their general purpose they differ from those discussed above. The first ten, as has been pointed out, had been found to be for the protection of the rational freedom of the individual against attack by the federal power. They had been deemed sufficient for this purpose and from the year 1804 the Constitution had remained without verbal change, however much it might have been modified in meaning by the judicial labors of such men as MARSHALL.[1] But there can be no entire rest in the condition

[1] Marshall was Chief Justice of the Supreme Court for thirty-four years, and under his masterful influence as a moderate federalist the court interpreted the meaning and scope of many important provisions of the Constitution. It is well known that Mr. Jefferson and his followers were greatly alarmed by this work of exposition, considering it as a subtle undermining of the very foundation of our confederated fabric, and feeling, doubtless, that the instrument itself was being amended by the judges instead of by the methods pointed out in the organic law. It would, however, not be strictly logical to include any detailed discussion of this work of interpretation, interesting as it may be, in an essay on amendments properly so called. Exposition is not amendment. It is an effort, presumably candid,

of institutions that have any germs of life. The pendulum was swinging to the other extreme. The controversies concerning nullification and State sovereignty, the decision of the Supreme Court in the case of Dred Scott concerning the question of citizenship in the United States, the struggle over the institution of slavery and its practical destruction by the war, and the anomalous condition of the country at the termination of actual hostilities, all led up to and resulted in the predominant feeling that it was timely to impose certain restrictions on the States in favor of individual freedom. The thirteenth amendment, which had been proposed on the 1st of February, 1865, was declared to have been adopted by a proclamation on December 18, 1865. It provides that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction, and that Congress shall have power to enforce this article by appropriate legislation.

The language of this article is taken from the celebrated ordinance of July 13, 1787, for the government of the Northwest Territory. Its meaning is no longer doubtful, but in a leading case, as late as 1872, it was the subject of a strenuous debate in the Supreme Court of the United States.[1]

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to tell us what the language of an instrument means, while an amendment *ex vi termini*, changes or adds to that language. The construction, however, placed on the various provisions of the fundamental law by Marshall and his school of jurists has been far-reaching and powerful in its effects, and forms an essential part of the present prevalent theory of our government. Among the great questions thus dealt with may be mentioned the appellate power of the Supreme Court of the United States over State courts, where federal rights are denied; the power of removing causes from a State to a federal court in cases involving difference of citizenship; the power of the United States to establish banks; the power of Congress to regulate commerce between the States and with foreign nations; and the power of federal courts to declare the nullity of State legislation where it impairs the obligation of contracts, or indeed violates any federal right or prohibition.

[1] Slaughter House Cases, 16 Wallace, 36, 69.

Mr. John A. Campbell, of New Orleans, who had been a Justice of that court, but had returned to the bar, took the point that the prohibition to the States to establish or maintain "involuntary servitude" would strike with nullity the Louisiana statute of 1869, which required all butchering for three parishes of that State, including the city of New Orleans, to be done only at one abattoir, and that the property of the Slaughter House Company, a party to the suits. Judge Campbell was a man of remarkable qualities, both as a lawyer and an advocate, and by a wealth of illustration drawn from French, Scotch and English history, as to *banalités*, multures, thirlage, thraldoms, astrictions, and monopolies, he sought to maintain his novel point. The court, however, did not adopt the views he urged on this branch of the case, and briefly disposed of them by holding that the word "servitude," as here used, and especially when qualified by the epithet "involuntary," referred not to servitudes which may have been at some times and in some countries attached to property, but to personal servitude, or bondage; and that the obvious purpose was to prohibit all shades and descriptions of slavery, whether of the ordinary type or under the guise of long apprenticeships or serfdom.

The fourteenth amendment was proposed in June, 1866, and in July, 1868, was declared to have been adopted by a sufficient number of States—thirty out of thirty-six—to embody it as the fourteenth article of the Amendments. Omitting reference to such portions of this important addition to our organic law as concern representation in Congress, the eligibility to federal office and the validity of public debts, we find that the remaining provisions are essentially the following:—

(1) All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside—

(2) No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States—

(3) Nor shall any State deprive *any person* of life, liberty, or property without due process of law—

(4) Nor deny to *any person* within its jurisdiction the equal protection of the laws.

These are provisions of far-reaching significance. The first is affirmative, the rest are negative. Their purpose is to protect individual right against the invasion by the power of the States. The interpretation of this amendment has been the subject of much discussion and of elaborate decision by the courts, and particularly by the Supreme Court of the United States.

In the *Slaughter House Cases*, already cited,[1] the counsel for the butchers of New Orleans further contended that the statute of Louisiana, of 1869, which practically compelled their clients to do all their butchering at the abattoir of the Slaughter House Company, was null and void, as in contravention, also, of the fourteenth amendment, in that it abridged the privileges and immunities of citizens of the United States, deprived them of liberty and property without due process of law, and denied them the equal protection of the laws. The discussion was protracted and interesting, and the brief which is in part printed in the report is notable as one of the first attempts to explain and apply this article of amendment. A bare majority of the court led by Mr. Justice MILLER decided against these contentions, as to the particular cases at bar, while four members of the court dissented with great vigor. The essential point settled by the majority of the court was that the Louisiana statute of 1869 so strenuously antagonized was an exercise of the POLICE POWER of that State in the protection of the public health, especially of New Orleans, and that there was nothing in the fourteenth amendment or the rights therein specified which could nullify such legislation. The decision in that case has been succeeded by many others, which constitute a body of doctrine in regard to this important article. The Supreme

[1] 16 Wallace, 36.

Court has been vigilant and, as a rule, conservative in its enforcement. In some cases, as in the one quoted above, rights claimed under the article have been denied; in others they have been recognized and enforced. A bare summary of the results of two decades of discussion may be briefly made as follows:—

A leading purpose of the fourteenth article of amendment was to define and recognize a citizenship of the United States. The doctrine of Mr. Calhoun and his followers that there was no such thing as citizenship of the United States, independent of that of the State, was reversed. The subject was removed from the region of discussion and doubt. The amendment "recognizes, if it does not create citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the Constitution or laws of any State or the condition of their ancestry."[1] The amendment declares that there is a citizenship of the United States without regard to the fact of citizenship of a particular State, and "it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States."[2] Declaring as it does that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and conferring as it does on the Congress the right to enforce its provisions by appropriate legislation, it is intended to protect the federal rights of the individual American freedman against State invasion. What all these federal rights and immunities are, it is difficult to say; but it is probably safe to affirm that whatever rights and immunities of a federal character are or may hereafter be lawfully conferred on the citizen of the United States as such, are thus shielded from attack by any State authority. Declaring as the amendment does that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its

[1] FIELD, J., 16 Wallace, 95. [2] 16 Wallace, 73.

jurisdiction the equal protection of the laws, it establishes a defense to freedom, to industry, to rightful endeavor, of the most ample character. According to the French idea that it is the unexpected which always happens, and in pursuance of the rule that the writers of such articles often build wiser than they knew, it has been found that the scope of the amendment is broader than it seemed at first. It is not only for the protection of negroes, but of all other men who may be concerned. It guards the rights, not only of natural persons, but of those juridical beings that are called corporations.[1] It is for all sorts and conditions of men and societies of men. Even the poor Chinamen toiling in the laundries of San Francisco have found that it may be successfully invoked.[2]

The fifteenth article of amendment was proposed in February, 1869, and in March, 1870, was declared to have been ratified by twenty-nine of the then thirty-seven States. It enacts that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude; and that the Congress shall have power to enforce this article by appropriate legislation. It has been held that these provisions do not confer the right of suffrage, but invest citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise, for the reasons catalogued in the amendment; and empower Congress to enforce that right of exemption by "appropriate legislation."[3] When by an act of May 31, 1870, Congress went beyond the scope of the amendment in the matter of State elections, its action was held by the Supreme Court to be unauthorized and inappropriate.[4] It would seem that the amendment offers no obstacle to the imposition of educational qualifications, or indeed, any other which it does not prohibit, and the sooner such restrictions

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[1] Santa Clara Co. *vs.* So. Pac. R. R. Co., 118 U. S., 394. [2] Yick Wo *vs.* Hopkins, *Id.*, 356. [3] U. S. *vs.* Reese, 92 U. S., 214. [4] *Id.*

of a reasonable and honest character are imposed, the better for every State.[1]

We find, then, that the evolution of amendment in the Constitution of the United States has been steadily making for rational freedom. By the earlier amendments the individual was guaranteed protection against the apprehended power of the federal government; by the later articles, he is sought to be protected chiefly against the abuse of power by the governments of the respective States. His guardian angels walk on either hand. We may well say of our country, in the impassioned language of Lowell:—

> No poorest in thy borders but may now
> Lift to the juster skies a man's enfranchised brow.

Neither nation nor State can hereafter lawfully impair or abridge in all this great land these consecrated rights. The idea enfolded in the saying that the Sabbath was made for man and not man for the Sabbath, is here developed in political institutions. They are not to exist for their own sake, arbitrary, autocratic, imperial, archaic, crushing the individual with a weight of power. They are not to be paternal or socialistic. They are made for man, and not man for them. They are means to an end, and the end is the evolution of the human soul.

And, as shown by the decisions of our highest federal tribunal, the articles of amendment are not merely abstract statements. They are not barren platitudes without a sanction. Under a system of law and jurisprudence unique in the history of the world, the rights secured by these articles may be enforced in appropriate courts. The United States constitute a great and powerful nation, but its Congress and its executive authorities together cannot deprive any man of one of these rights without creating an opportunity of legal re-

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[1] But see Professor A. C. McLaughlin's discussion of the Mississippi restrictions in *The Atlantic Monthly* for December, 1892.

dress.[1] A State may be very large, very strong, and very close to its people, but it cannot infringe one of these rights without affording the same opportunity.[2] By removal of causes, by appeal and writ of error, and by writ of *habeas corpus*, in some form or other, whether the injured person be natural or artificial, rich or poor, young or old, and as a rule, whether the injury be in a pecuniary sense small or great, the judicial remedy can be applied, and the constitutional protection defined and vindicated.

It goes without saying that we must not be too optimistic in our anticipations of the future. It must needs be that offenses come. The greed of capital, the blind and sometimes brutal struggles of labor, the lust of office, the recklessness of faction, the bitterness of sectional strife will continually remind us that what is called happiness is not for nations any more than for individuals. The world has not been constructed as a flowery bed of ease. But, so far as we can see, the conditions for the development of true manhood are at this time better in the United States than in any other country of the world. The whole tendency of our constitutional law is to hedge about that divinity which resides in the soul of man, to guard it in such development as it may be inspired to select. And such a tendency, such an unceasing purpose, such a panoply, are of all institutional things most precious. For, after all is said and done, what price, that is not a vile one, can a man set upon his soul?

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[1] U. S. *vs.* Harris, 106 U. S., 629. [2] Yick Wo *vs.* Hopkins, 118 U. S., 356. Railway Co. *vs.* Minnesota, 134 U. S., 418.